

Before the  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Procedures for Reviewing Requests  
for Relief From State and Local  
Regulations Pursuant to Section  
332(c)(7)(B)(v) of the Communications  
Act of 1934

WT Docket No. 97-197

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COMMENTS

The Cellular Phone Taskforce ("Taskforce") hereby submits comments in the above-captioned proceeding, pursuant to the Commission's Notice of Proposed Rulemaking released August 25, 1997.

In general, the Taskforce believes that the Commission's concern "that state and local governments may delay the siting of facilities based upon concerns about the effects of RF emissions and a carrier's compliance with our RF guidelines" (paragraph 145 of the Notice of Proposed Rulemaking) is misplaced, because, as the Commission also has noted (paragraph 127 of the Notice of Proposed Rulemaking), Section 253(b) and (c) of the Communications Act preserves the rights of state and local governments to impose requirements necessary to protect the public safety and welfare. The public safety and welfare is not something which may be compromised in order to streamline the siting of communication facilities! In this proceeding the Commission is proposing to tie the hands of state and local governments in their efforts to ensure that the Commission's own safety guidelines are enforced!

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In light of the Commission's own admitted lack of ability, due to staffing and funding limitations, to monitor the radiofrequency emissions of hundreds of thousands of facilities around the country, therefore the monitoring of such emissions falls back on state and local governments, which must remain free to impose compliance requirements to the degree they see fit in order to protect the public safety and welfare, which is their responsibility under the Constitution of the United States. To deprive state and local governments of their prerogatives to monitor these facilities would put the entire telecommunications industry on the honor system as far as radiofrequency emissions are concerned. Indeed this is what the Commission is explicitly proposing, i.e. "that a uniform demonstration of compliance should consist of a written statement" (paragraph 146 of the Notice of Proposed Rulemaking) and that "Generally, we presume that licensees are in compliance with our rules unless presented with evidence to the contrary" (paragraph 151). This is contrary to the will of the Congress of the United States. Congress, rightly or wrongly, by the Telecommunications Act of 1996, has decided that only the Federal Communications Commission may regulate the environmental effects of radio frequency emissions. However, the Congress did not preempt state and local governments from enforcing the Commission's regulations, and Congress explicitly required the Commission's rules to be "effective" (Telecommunications Act, Section 704(b). Unenforceable rules, or rules to be enforced by the honor system only, do not

constitute "effective rules" as required by the Congress in the Telecommunications Act of 1996. To set forth uniform procedures for enforcing compliance with radiofrequency emission standards and to prohibit states and local governments from veering from these procedures, is to remove the right of enforcement entirely from states and local governments, which is something the Congress did not do. Protecting the public safety and welfare is still the responsibility of state and local governments in the United States of America, and indeed the Federal Communications Commission has repeatedly itself stated that it is not a health and safety agency and does not have the jurisdiction even to investigate, much less enforce, complaints about health and safety matters.<sup>1</sup> Therefore the Commission has no business proposing to preempt states and local governments from enforcing safety regulations in this area.

1. Regarding the request of the PCIA regarding zoning board hearings

The Personal Communications Industry Association (PCIA) has requested that the Commission "prohibit adducing evidence regarding the health effects of RF emissions at zoning board hearings" (paragraph 115 of the Notice of Proposed Rulemaking). This would be a clear violation the First Amendment Right to free speech accorded to all Americans, and would be unconsti-

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<sup>1</sup> See, for example, the letter from the Commission to Lucinda Grant of the Electrical Sensitivity Network, dated January 23, 1997, attached here as Exhibit A.

tutional even if adopted. The Taskforce opposes this proposal unequivocally.

2. Regarding the Commission's proposal to preempt decisions by private entities

The Commission is proposing (paragraph 141 of the Notice of Proposed Rulemaking) to prohibit private entities "such as homeowner associations and private land covenants" from keeping telecommunication facilities off their own land for reasons of health concerns about RF emissions! The Taskforce believes this would be unconstitutional for the same reason as the prohibition of public testimony about health effects at zoning board hearings. It would violate the free speech of private citizens.

Furthermore, "non-governmental entities" (paragraph 141) are by definition not governmental entities, cannot be stretched to fall under the definition of "state or local government or any instrumentality thereof" and are not preempted in any manner by Section 332(c)(7)(B)(iv) of the Communications Act.

3. Regarding demonstration of RF compliance

The Commission is proposing both that "there should be some limit as to the type of information that a state or local authority may seek from a personal wireless service provider" (paragraph 142 of the Notice of Proposed Rulemaking) and that "The state or local government would have the burden" of overcoming a rebuttable presumption of compliance. The Commission seeks comment "in the interest of minimizing any potential adverse effect the establishment of a rebuttable presumption

may have on state and local authorities' ability to ensure the health and safety of their citizens" (paragraph 151).

The Taskforce's position is that if local governments aren't allowed to request the information they want from a personal wireless service provider, their ability to ever prove non-compliance, as well as, therefore, their ability to protect the health and safety of citizens, becomes fatally impaired.

Furthermore, the alternatives the Commission is considering in paragraphs 142 through 148 of the Notice of Proposed Rulemaking have the effect of removing authority over health and safety enforcement in this area from state and local governments altogether. Under paragraph 143, the Commission is proposing a more limited showing. Under this proposal, state and local authorities would not be permitted to require any RF emission testing, and would be limited to requesting a written statement of compliance, both from facilities that are categorically excluded from routine Commission evaluation, and from facilities that are not so excluded. Under paragraph 144, the Commission is proposing a more detailed showing. Again, for facilities that are not categorically excluded, the Commission is proposing state and local authorities be permitted to ask only for a written statement of compliance, and not for actual testing of RF emissions. For facilities that are categorically excluded, here the Commission is asking for comments on what state and local governments be allowed to require by way of a demonstra-

tion of compliance. But again, the Commission states in paragraph 146 that even here, "We believe that a uniform demonstration of compliance should consist of a written statement."

The Taskforce's position is that the honor system is not good enough, and that actual RF emission testing must be allowed to be required by state and local governments in order to preserve their ability to ensure the health and safety of their citizens, not just in the case of non-excluded facilities, but also in the case of excluded facilities, because if states and local governments do not require such testing, and the Commission itself does not require such testing, then such testing will not be done at all and we have the honor system! It should not be necessary to explain why the honor system will not work. But, for example, I have personally visited many rooftops in New York City, and I possess photographs of others, where personal communications services (PCS) antennas are mounted, on rooftops that are used for sunbathing and recreation and for other purposes, with full public access by residents of those and adjoining buildings, where any member of the public could go and grab one of those antennas with their bare hands if they so desired, and there is no fence, or sign warning of the danger, at any of these facilities. These companies are being left to the honor system, and none of these sites is in compliance with the Commission's safety standards.

The Taskforce's position is that, at minimum, states and local governments be allowed to demand regular emissions testing

at all communications facilities, and we agree with the Local and State Government Advisory Committee (LSGAC) that local taxpayers should not bear the costs of such testing.

4. Regarding the definition of "interested parties"

In paragraph 153 of the Notice of Proposed Rulemaking, the Commission proposes to allow interested parties to rebut the presumption of compliance. As RF emissions that broadcast into space reach every member of the public within a certain distance from the facility and have the potential of affecting their health, it is the Taskforce's strong position that RF emission compliance is in the interest of everybody, and that every member of a community where a communications facility is sited is an interested party.


5. Conclusion

In conclusion, the Taskforce believes that granting relief from state and local regulations designed to enforce the Commission's safety rules will infringe unlawfully on the right of states and local governments to protect the public safety and welfare, and will leave those very safety rules totally unenforced. We oppose this Proposed Rulemaking in its entirety.

Respectfully submitted,

October 6, 1997

by

  
Arthur Firstenberg  
President, Cellular Phone Taskforce  
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# EXHIBIT A

## FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

January 23, 1997

Lucinda Grant  
Electrical Sensitivity Network  
P.O. Box 4146  
Prescott, AZ 86302

Dear Ms. Grant:

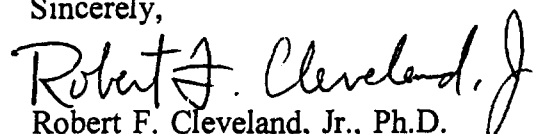
Your letter of September 19, 1996, to Reed E. Hundt, Chairman of the Federal Communications Commission (FCC), was forwarded to this office for a response. Your letter related the concern you have over the future proliferation of telecommunications services and the effect this may have on individuals who are "electrically sensitive."

The FCC recently adopted guidelines for evaluating human exposure to radiofrequency (RF) emissions from FCC-regulated telecommunications sources (61 Fed. Register 41,006, 1996). These guidelines were based on recommendations made to the FCC by the various agencies of the U.S. Government which are responsible for human health and safety. These agencies include the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Institute for Occupational Safety and Health and the Occupational Safety and Health Administration. All of these agencies have expressed their support for our guidelines and their appropriateness for protecting human health.

Since the FCC is not a health and safety agency, we have neither the jurisdiction or the resources to investigate the biological effects you describe. We must rely upon the agencies mentioned above for advice and guidance in such areas. Therefore, if you have evidence for harmful biological effects for which our guidelines do not provide protection, it is appropriate that you take this up with the agencies mentioned above, particularly the EPA and the FDA.

I hope that this information will be helpful. If you have any further questions please write this office directly, or you can call our RF Information Line at: (202) 418-2464.

Sincerely,



Robert F. Cleveland, Jr., Ph.D.  
Office of Engineering & Technology  
Federal Communications Commission

cc. R. Engelman